Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area	)	WC Docket No. 08-49

REPLY COMMENTS OF NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC

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NuVox, and XO Communications, LLC (hereinafter referred to as "Joint Commenters"), through counsel and pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on April 15, 2008,[1] hereby provide their reply comments on the petition filed by the Verizon Telephone Companies ("Verizon") on March 31, 2008 seeking forbearance from certain of the Commission's rules within the portion of Verizon's incumbent local service territory in the Virginia Beach Metropolitan Statistical Area ("MSA") where Cox Communications, Inc. is the incumbent cable operator. Verizon seeks substantial deregulation,[2] pursuant to Section 10 of the Communications Act of 1934, as amended ("Act").[3]

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1 *Pleading Cycle Established for Comments on the Verizon Telephone Companies Petition for Forbearance in the Virginia Beach Metropolitan Statistical Area,* WC Docket No. 08-49, Public Notice, DA 08-878 (rel. Apr. 15, 2008) ("*Second Verizon Virginia Beach Petition*").

2 The Verizon Petition requests that the Commission forbear from applying to Verizon: (1) loop and transport unbundling obligations, under 47 U.S.C. § 251(c) (51 C.F.R. §§ 51.319(a), (b) and (e)); (2) Part 61 dominant carrier tariff requirements (51 C.F.R. §§ 61.32, 61.33, 61.58 and 61.59); (3) Part 61 price cap regulations (51 C.F.R. §§ 61.41-61.49); (4) Computer III requirements, including CEI and ONA requirements; and (4) dominant carrier requirements, arising under Section 214 of the Act and Part 63 of the Commission's rules, addressing the processes for acquiring lines, discontinuing services,

I. INTRODUCTION AND SUMMARY

The initial comments filed in this proceeding unanimously confirm that Verizon has overreached in its quest for forbearance. The comments confirm that the facts presented in the petition are simply a subset of the same facts upon which Verizon relied in support of its prior forbearance petition for the Virginia Beach Metropolitan Statistical Area ("MSA") which was unanimously denied in its entirety less than four months before Verizon filed the instant petition.[4] In the words of Cox Communications, Inc. ("Cox"): "Verizon has identified no change in the market or new circumstance that would justify a different result than the *Six MSA Order* just 161 days ago."[5] Because it has failed to submit any additional material facts in support of its new Virginia Beach petition, Verizon has failed to make a *prima facie* case to justify a different outcome than the one the Commission reached in the prior proceeding. Its petition therefore should be dismissed as facially insufficient or summarily denied.

If the Commission declines to dismiss or summarily deny the petition, which it should not, it must deny Verizon the forbearance it seeks on the merits because Verizon clearly has not met the statutory prerequisites for forbearance contained in Section 10 of the Act. The initial comments verify that there is no support for the deregulation being sought by Verizon for the Virginia Beach MSA. The comments were unanimous that Verizon has not met the statutory

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assigning or transferring control and acquiring affiliation (51 C.F.R. §§ 63.03, 63.04, and 63.60-63.66).

3 47 U.S.C. § 160.

4 *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, WC Docket No. 06-172, FCC 07-212 (rel. Dec. 5, 2007) ("*6-MSA Order*").

5 Comments of Cox Communications, Inc., WC Docket No. 08-49, at 4 (filed May 13, 2008) ("*Cox Comments*"). *See also* Comments of Sprint Nextel Corporation, WC Docket No. 08-49, at 1 (filed May 13, 2008) ("*Sprint Nextel Comments*") ("[T]he Commission should not allow Verizon to continue to clutter its docket with a series of repetitive, virtually identical forbearance petitions that merely rehash arguments and evidence that the Commission has previously considered and rejected.").

requirements for forbearance and that a grant of forbearance would result in significant negative impacts on consumers throughout the Virginia Beach MSA.

Several commenters emphasized that the limited data produced by Verizon fails to demonstrate the presence of sufficient facilities-based (*i.e.*, competitive loop-based) competition in any product market in the Virginia Beach MSA, as required by Section 10.[6] Moreover, the limited information Verizon has produced was criticized as incomplete and inflating the extent of competition Verizon faces. COMPTEL, *et al.* highlighted the fact that Verizon has not provided data "that would permit the Commission to conduct a forbearance analysis for each market segment" and that "[a]lthough Verizon alleges 'greater competition for enterprise customers in Cox's service territory in the Virginia Beach MSA than in either Omaha or Anchorage,' the 'evidence' marshaled by Verizon in support of this point is both superficial and tangential, failing to provide any meaningful indication of actual competition in Cox's service territory in the Virginia Beach MSA."[7]

Commenters also focused particularly on the consumer harms that would result if Verizon's petition is granted. For instance, the cities of Chesapeake, Norfolk, Portsmouth, and Virginia Beach, Virginia (referred to hereinafter as the "Virginia Cities") pointed out in joint comments that the absence of a Section 251(c)(3) unbundling obligation, "will allow Verizon to raise the wholesale rates it charges CLECs for the facilities CLECs need to provide service. In turn, CLECs will likely have to raise retail rates in order to recover their costs from this increase

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6 *See, e.g., Sprint Nextel Comments*, at 6 ("Verizon has not shown that competitive service providers have any meaningful alternatives to its facilities; continued access to unbundled network elements ('UNEs') of loops, subloops, and transport remain critical inputs enabling carriers to compete at the vast majority of Cox's service territory wire in the Virginia Beach MSA."). *See also Cox Comments*, at 2.

7 Opposition of COMPTEL. *et al.*, WC Docket No. 08-49, at 9 (filed May 13, 2008) ("*COMPTEL, et al. Opposition*") (footnote omitted).

in their operating expenses."[8] The Virginia Cities expressed their concern that "CLECs would find it economically unfeasible to compete with Verizon and withdraw from the market altogether," resulting in a reduction in the number of competitors providing traditional wireline service in the Virginia Beach MSA.[9] The Telecom Investors cautioned that granting Verizon's petition would result in a duopoly market and decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers.[10] In short, the comments effectively catalogue the myriad procedural and substantive defects that pervade the Verizon petition and demand that it be rejected by the Commission.

II. THE DATA PROVIDED BY VERIZON IS INSUFFICIENT TO MEET ITS BURDEN OF PROOF

Consistent with the *Qwest Omaha* opinion, Verizon is required to provide (and already should have provided) the Commission (and interested parties) detailed data showing the nature and extent of competitive activity in each product market in each wire center in Cox's service territory within the Virginia Beach MSA.[11] The petitioning party has the burden of proof to bring forth this data and, if it fails to do so, its petition must be denied.[12]

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8 Reply Comments of the City of Chesapeake, Virginia, City of Norfolk, Virginia, City of Portsmouth, Virginia, City of Virginia Beach Virginia, WC Docket No. 08-49 (filed May 27, 2008), at 4 ("*Virginia Cities Reply Comments*").

9 *Id.*

10 Opposition of Telecom Investors, WC Docket No. 08-49, at 21-34 (filed May 13, 2008) ("*Telecom Investors Opposition*")

11 *Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, Slip Op. at 14-16 (D.C. Cir. Mar. 23, 2007) ("*Qwest Omaha*").

12 *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 61-62 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir. Mar. 23, 2007). *See also* Comments of NuVox Communications and XO Communications, LLC, WC Docket No. 08-49, at 8 (filed May 13, 2008) ("*Covad, et al. Comments*").

As the comments show, Verizon has fallen far short of meeting this fundamental requirement in a number of critical ways. First, Verizon has failed to provide sufficient data on market coverage by facilities-based competitors in the mass market or the enterprise market. Instead, it relies on high-level or imprecise data obtained from websites. Cbeyond, Inc., *et al.* noted that Verizon's representation that the listing by Cox of all 13 rate centers within the Virginia Beach MSA within the Cox local calling area "does not prove that Cox has 'covered' 75 percent of the end-users in that rate center (or the wire centers within that rate center) with its network" since "Cox could provide separate toll-free calling areas in each of the 13 rate centers . . . even though Cox's network passes few end users in each rate center."[13]

Second, Verizon has failed to provide sufficient data to determine the market penetration of facilities-based competitors in the enterprise product market either in the Cox service territory within the Virginia Beach MSA as a whole or in individual wire centers. It is well-established that "the Commission must conduct a separate analysis of the extent to which competition exists within each market segment."[14] Yet, as pointed out by COMPTEL, *et al.*, Verizon does not provide sufficient data for the Commission to engage in a market share or other analysis for any individual product market.[15] Instead, Verizon seeks to combine data on its own market share in these geographic markets with high-level, qualitative information about the offerings of competitors, including those that are not facilities-based. One Communications, Inc., *et al.* correctly observed that "[Verizon] relies on press statements and website sales material describing the business retail service offerings of competitors . . . that rely on Verizon's

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13 Opposition of Cbeyond, Inc., *et al.*, WC Docket No. 08-49, at 31 (filed May 13, 2008) ("*Cbeyond, et al. Opposition*").

14 *COMPTEL, et al. Opposition*, at 8.

15 *Id.*

loop and transport facilities. This evidence has no relevance to whether competitors can efficiently deploy such facilities themselves."[16]

Third, as noted by several commenters, Verizon's claim that losses in residential access lines provide "an independent basis" on which to grant forbearance[17] is flawed and, more importantly, has already been rejected by the Commission.[18] In the *6-MSA Order*, the Commission "reject[ed] Verizon's attempt to demonstrate that a particular MSA is competitive by calculating percentage reductions in retail lines."[19] The Commission found that "[t]here are many possible reasons for such decreases unrelated to the existence of last-mile facilities-based competition. For example . . . the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access."[20] Verizon has provided no justification for reconsideration of this conclusion reached in the *6-MSA Order*.

Further, as several commenters noted, Verizon has provided absolutely no market coverage or penetration information for the wholesale market.[21] "[C]onsistent with the Commission's previous finding [in the *6-MSA Order*], nothing in Verizon's petition 'reflects any significant alternative sources of wholesale inputs for carriers' in Virginia Beach."[22] Therefore, as concluded by COMPTEL, *et al.*, Verizon has essentially defaulted on its obligation to show

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16 *Cbeyond, et al. Opposition*, at 40-41.

17 *See Second Verizon Virginia Beach Petition*, at 17.

18 *See Opposition of COMPTEL, et al.*, at 15; *Sprint Nextel Comments*, at 8; , *Cavalier Telephone, LLC's Opposition,* WC Docket No. 07-97 (filed May 13, 2008), at 24-25 ("*Cavalier Opposition*").

19 *Six-MSA Order*, at ¶ 32.

20 *Id.*

21 *See COMPTEL, et al. Opposition*, at 22-23; *Sprint Nextel Comments*, at 11.

22 *See COMPTEL, et al. Opposition*, at 23 (citation omitted).

the existence of a viable and ubiquitous facilities-based wholesale market in the absence of UNEs."[23] Finally, Verizon simply ignores the broadband market and provides no data or analysis whatsoever of that product market. The broadband market is a distinct product market that cannot be lumped into the voice mass market.

When taken together, these failures are so severe as to justify denial of the petition even absent other considerations. They also are inexcusable. Verizon controls the filing of its petition and is well aware of the Commission's forbearance requirements. It should not be allowed to game the process in this manner.

III. VERIZON HAS NOT ESTABLISHED THAT SUFFICIENT COMPETITION EXISTS WITHIN EACH RELEVANT MARKET TO WARRANT FORBEARANCE FROM STATUTORY UNBUNDLING REQUIREMENTS

Verizon contends "[c]urrent data demonstrate that the forbearance standard applied by the Commission in the *Six MSA Order* unquestionably is satisfied in Cox's service territory in the Virginia Beach MSA."[24] Verizon's contention is based on the residential market presence of cable provider Cox, various wireless providers that are serving cut-the-cord customers, and the use of Verizon's Wholesale Advantage service and resold lines by non facilities-based competitors. However, as discussed below, various commenters showed that Verizon has utterly failed to prove that facilities-based competition from any of these sources is sufficient to justify forbearance in any wire center in the Virginia Beach MSA.

Commenters cautioned that in order to satisfy the requirements of Section 10, Verizon must demonstrate with specificity the existence of sufficient actual competition by facilities-based (*i.e.*, competitive loop-based) competitors in each relevant product market. As noted by COMPTEL, *et al.*, [p]roviding evidence of purported competition in one market

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23 *Id.*

24 *Second Verizon Virginia Beach Petition*, at 10.

segment (*e.g.*, the residential mass market) can hardly be considered specific evidence of the state of competition in *other* market segments (*e.g.*, SME voice and broadband services)."[25] Verizon has failed to make the required product market-specific showing.

Importantly, commenters also revealed that Verizon's recent pricing behavior demonstrates the absence of sufficient competition in the enterprise market in the Virginia Beach MSA. Cbeyond, *et al.* undertook a review of Verizon's state tariff filings and found that "the company has been consistently increasing rates for many of its business services in Virginia."[26] Specifically, Cbeyond, *et al.* found that "Verizon has increased rates for various business services no less than 15 times since it filed its request for forbearance in the Virginia Beach MSA on September 6, 2006."[27] If Verizon's claim that the enterprise market in Cox's service territory in the Virginia Beach MSA is sufficiently competitive to warrant forbearance had any merit, "one would reasonably expect that it would have been forced to lower its rates in order to attract new customers and retain existing ones."[28] Consequently, the fact that Verizon has seen fit to repeatedly increase its rates provides powerful evidence that competition in Virginia Beach is not sufficiently robust to constrain Verizon's market power.

A. Cable Competition

Verizon's principal foundational basis for forbearance in Cox's service territory in the Virginia Beach MSA is the presence of cable competitor Cox. "As in the 2007 [Virginia Beach MSA] Petition, Verizon relies almost exclusively on competition from Cox to allege that

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25 *COMPTEL, et al. Opposition*, at 8-9 (emphasis in original).

26 *Cbeyond, et al. Opposition*, at 33.

27 *Id.* (footnote omittd).

28 *Id.*, at 33-34.

forbearance is warranted in Cox's service territory."[29] Although Verizon has offered little to no data regarding cable provider coverage or penetration for each product market on a wire center specific basis, it generally contends that cable-based competition is sufficiently robust to justify forbearance throughout the Cox service territory in the Virginia Beach MSA.[30] It is telling, however, that Cox has clearly and unequivocally informed the Commission that Verizon has grossly overstated cable competition in the voice market and that forbearance from Section 251(c) unbundling requirements is not warranted.[31]

Data submitted by Cox proves that Verizon has "exaggerated"[32] Cox's presence in both the mass market and the enterprise market. With respect to the mass market, Cox reported that "although [it] again is the only major residential competitor that Verizon identifies by name or for which Verizon even attempts to quantify the number of lines served, Verizon's own estimate of Cox's subscriber numbers falls far short of the . . . overall competitive penetration Verizon claims."[33] Cox further noted that "Verizon remains the largest residential competitor in the market."[34]

The data for the enterprise market also unequivocally shows that Verizon has grossly exaggerated cable operators' success in and their ability to serve enterprise customers. Verizon relies heavily on the contention that Cox has network facilities in place throughout its service territory in the Virginia Beach MSA that it can use to serve all enterprise customers.[35]

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29 *Cox Comments*, at 1-2.

30 *Verizon Second Virginia Beach Petition*, at 5-8, 21-26.

31 *Cox Comments*, at 4-10.

32 *Id.*, at 5.

33 *Id.*, at 6.

34 *Id.*

35 *See Second Verizon Virginia Beach Petition*, at 21-26.

The underlying premise of Verizon's argument – that a cable network that passes a particular area is capable of providing telephone service to all enterprise customers in that area—does not accurately reflect the reality of the marketplace. COMPTEL, *et al.* pointed out that "Verizon ignores the fact that '[e]ven where cable television [copper coaxial] networks reach [] business customers,' the networks 'typically lack the capacity to serve large numbers of business customers that require telecommunications and Internet services at DS1 and higher speeds.'"[36] Moreover, Cox itself reported that "[its] network in its service areas of the Virginia Beach MSA is far from ubiquitous, particularly in business areas that are not immediately adjacent to residential communities. Even when [its] transport network passes a building, facilities construction often is necessary to reach potential customers."[37] Cox added that "Verizon retains a commanding position in the enterprise market" in the Virginia Beach MSA.[38]

Cox added that "Verizon's purported evidence of competition from other carriers in the Virginia Beach market does not demonstrate actual enterprise competition"[39] and concluded that "[t]he Commission was right when it determined that the enterprise market in the Virginia Beach MSA required denial of the 2007 Petition . . . [Verizon] has provided no new information [in this proceeding] that would justify a different outcome."[40]

B. Over-the-Top VoIP Competition

The Commission excluded over-the-top VoIP competition from its competitive analysis in the *6-MSA Order* on the ground that "there is no data in the record that justify finding

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36 *COMPTEL, et al. Opposition*, at 19.

37 *Cox Comments*, at 8-9.

38 *Id.*, at 8.

39 *Id.*, at 9.

40 *Id.*

that these providers offer close substitute services."[41] Verizon concedes this fact but nevertheless argues that customers served by over-the-top VoIP competitors should be included in the calculation of competitive activity in the Virginia Beach MSA. As noted by commenters, however, Verizon offers no basis for the Commission to reverse this finding.[42]

Verizon suggests that the Commission should reverse itself because "there are more than 20 'over-the-top' VoIP providers that currently offer services with features comparable to Verizon's wireline telephone service, at prices that typically are lower than Verizon's prices . . ."[43] As pointed out by Cbeyond, *et al.*, however, "Verizon filed *nearly the exact same data and made the exact same arguments using the exact same language* in the petitions filed in the 6-MSA proceeding."[44] The Commission should disregard this brazen attempt at reconsideration of the *6-MSA Order.*

IV. GRANTING FORBEARANCE WILL, AT BEST, RESULT IN A DUOPOLY IN THE VIRGINIA BEACH MSA

As explained in several of the comments, currently there is insufficient competition – from cable providers or others – to justify forbearance in any wire center in the Virginia Beach MSA.[45] Further, the limited non-cable competition that does exist in the Virginia Beach MSA is dependent on the continued ability to access Verizon's loops and transport facilities pursuant to Section 251(c)(3). Consequently, if access to Verizon's loops and transport facilities under Section 251(c)(3) is eliminated, it is highly likely that the only entities that will be able to remain in the market to compete against Verizon will be the cable companies, to the

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41 *6-MSA Order*, at ¶ 23.

42 *COMPTEL, et al. Opposition*, at 14. *See also Telecom Investors Opposition*, at 10-11; *Cbeyond, et al. Opposition*, at 22-23.

43 *Second Verizon Virginia Beach Petition*, at 16-17.

44 *Cbeyond, et al. Opposition*, at 22-23 (emphasis in original).

45 *See, e.g., Sprint Nextel Comments*, at 8-13; *Cox Comments*, at 5-10.

extent those entities are able to provide service through use of their own facilities.[46] This is what has occurred in the Omaha MSA as a direct result of the premature grant of Section 251(c)(3) forbearance to Qwest in portions of that market.[47]

Verizon no doubt will argue that cable competition alone will sufficiently discipline its pricing behavior to permit forbearance from federal unbundling requirements. That claim is frivolous. It ignores the uniformly held view of economists – and the Commission itself – that duopoly markets are not competitive. As noted by the Telecom Investor comments, in a duopoly environment:

> both parties are reluctant to engage in mutually assured destruction . . . Consequently, both parties have an incentive to act to maximize joint profits, at the expense of competition. A duopoly makes interdependent behavior inevitable between the duopolists simply because their marketing decisions of one will have a direct effect on the other. Each firm knows that if it takes an action to the detriment of the other, the other must and will respond.[48]

The Commission understands that entities in duopoly or oligopoly markets take their rivals' actions into account in deciding the actions they will take, and that "when market participants' actions are interdependent, noncompetitive collusive behavior that closely

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46 As seen in the Anchorage forbearance proceeding, in some cases cable operators rely on ILEC Section 251(c)(3) UNEs or other wholesale facilities to provide service, especially to enterprise customers. *See Anchorage Forbearance Order*, at ¶ 36.

47 *See Petition of McLeodUSA Telecommunications Services, Inc. to Cease Providing Local Exchange Voice Services in Nebraska Wire Centers*, Application No. C-3992, Nebraska Public Service Commission (filed Apr. 11, 2008), at 2. ("It does not make economic sense under the arrangements offered by Qwest to date for McLeodUSA to continue to provide local exchange voice services to its remaining residential customers and many of its small business customers in the Omaha MSA, nor is it economically viable for McLeodUSA to convert these customers to a resale platform.").

48 *Telecom Investors Opposition*, at 28.

resembles cartel behavior may result – that is, high and stable prices."[49] The Commission has long recognized that

> [a]lthough competition theory does not provide a hard and fast rule on the number of equally sized competitors that are necessary to ensure that the full benefits of competition are realized, both economic theory and empirical studies suggest that a market that has five or more relatively equal sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.[50]

The D.C. Circuit agrees with this assessment, finding that "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."[51] The court added that "a durable duopoly affords both the opportunity and the incentive for both firms to coordinate to increase prices . . . above competitive levels."[52]

In light of the significant possibility that premature elimination of Section 251(c)(3) unbundling obligations ultimately will result, at best,[53] in a Verizon-cable duopoly which will necessarily lead to less choice in service offerings and higher prices for consumers, Verizon's request for forbearance from Section 251(c)(3) requirements in the Virginia Beach MSA must be denied.

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49 *Application of Echostar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 170 (2002) ("*Echostar Order*").

50 *2002 Biennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 289 (2002).

51 *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001).

52 *Id.*, at 725.

53 A duopoly only will result in those circumstances where the cable provider is able to use its own facilities to provide service. If the cable operator is forced to rely on Verizon's network to reach customers – a situation that is especially prevalent with enterprise customers – Verizon will be the only carrier that can successfully compete.

V. BROADBAND SERVICES MUST BE EVALUATED AS A SEPARATE PRODUCT MARKET

In prior forbearance proceedings, the Commission has defined the relevant product markets for purposes of its Section 10 forbearance analysis by "identifying and aggregating consumers with similar demand patterns."[54] To date, the Commission has identified two product markets and analyzed the impact of a forbearance grant on the services offered to the "mass market" and the "enterprise market."[55] The Joint Commenters agree that the Commission should separately consider these two product markets, since the customers in each market have different service needs and (to some extent) different sources of those services. However, broadband services also must be identified as a distinct product market and evaluated separately from the enterprise market and the mass market. Unlike the enterprise market or the mass market, which are comprised of particular types of customers, the broadband market encompasses both enterprise market *and* mass market customers. Thus, the inclusion and evaluation of broadband services in either the enterprise market or the mass market necessarily captures only a subset of the customers that utilize broadband services. A thorough and accurate evaluation of the effect of a forbearance grant therefore requires that broadband services be evaluated separately from other product markets.

In reviewing the proposed merger between Time Warner and AOL, the Commission recognized that the broadband Internet access market includes high-speed access, which it defined as "those services with over 200 kbps capability in at least one direction,"[56] and "advanced services," which it defined as those services "capable of 200 kbps or greater

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54 *See Omaha Forbearance Order*, at ¶18.

55 *See, e.g., Omaha Forbearance Order*, at ¶22.

56 *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, at ¶63 and n.185 (2001).

transmission in *both* directions."[57] The Commission contrasted these higher-speed broadband Internet access services with "narrowband" access services – defined as services obtained from "ISPs offering relatively low-speed access (typically between 28 and 56 kilobits per second ('kbps')) over local telephony plant" – which are used by the "majority of residential and small business consumers who purchase Internet access."[58]

The residential and small business consumers who purchase narrowband Internet access services are the same residential and small business customers that the Commission historically has included in the mass market when evaluating Section 10 forbearance requests. Since the mass market customers purchasing narrowband Internet access services do not represent all of the customers purchasing each of the varieties of broadband services, however, the broadband product market should not be considered a subset of, and evaluated only in conjunction with, the mass market product market. Likewise, since the enterprise market customers that purchase high-speed and advanced broadband services do not represent all of the customers purchasing each of the varieties of broadband services, the Commission also should not consider broadband services only in conjunction with its enterprise market analysis.

In sum, since the broadband services typically utilized by enterprise market and mass market customers are very different in terms of speed and price, and the broadband services provided to enterprise market customers cannot be substituted for the broadband services

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57 *Id.* at n.185 (emphasis in the original). This description of the broadband Internet access product market is similar to the market description offered by some commenters in the *6-MSA* forbearance proceeding. In that proceeding, EarthLink and New Edge Network described the broadband Internet access market as being comprised of two or three distinct product markets: (1) fixed lower speed broadband services of less than 2.5 Mbps; (2) mobile lower speed broadband services of less than 2.5 Mbps; and (3) higher speed broadband services above 2.5 Mbps that are capable of handling streaming video and other bandwidth intensive applications. *See Opposition of EarthLink, Inc. and New Edge Network, Inc. to the Petitions of Verizon Telephone Companies for Forbearance*, WC Docket No. 06-172, at 15 (filed Mar. 5, 2007).

58 *Id.*, at ¶63.

provided to mass market customers (and visa versa), an analysis of Verizon's request for forbearance must separately consider the impact such forbearance would have on the broadband services available to (and used by) enterprise market consumers and mass market consumers.

Moreover, the competitive options for obtaining broadband services also differ based on the nature of the customers to be served and the services requested. Any analysis of a forbearance petition which limits the evaluation only to either the mass market or the enterprise market will fail to consider whether there are competitive sources of the particular broadband services typically purchased by either product markets' customer base.

The need to separately evaluate the broadband service market is important because of the impact that forbearance from Section 251(c)(3) unbundling obligations would have on the ability of CLECs to provide broadband services to both the enterprise and mass market customers. Continued access to unbundled network elements is critical to CLECs' ability to act as a competitive source of broadband services.[59] If Verizon is granted forbearance from its unbundling obligation, CLECs will not have access to the facilities they need to provide broadband services to consumers. Thus, any forbearance grant will conflict with Congress's goal of promoting and increasing the deployment of advanced telecommunications capability throughout the United States.[60]

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59 Currently, there are few, if any, other viable competitive sources of either narrowband or high-speed broadband services available to consumers. While it is theoretically possible that broadband services could be provided via CMRS, satellite, broadband over power lines ("BPL"), or municipal broadband, the reality is that none of these technologies represent viable alternative sources today.

60 *See, e.g., In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 FCC Rcd 20913, at ¶4 (2000).

VI. VERIZON HAS NOT SHOWN THAT IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR COMPUTER III REQUIREMENTS

Several commenters showed that Verizon has failed to prove it is entitled to forbearance from Part 61 dominant carrier tariffing requirements, dominant carrier requirements arising under Section 214 of the Act and Pa rt 63 of the Commission's rules, or the Commission's Computer III rules, including CEI and ONA requirements. As noted by COMPTEL, *et al.*, "Verizon has failed to show robust facilities-based competition" and this failure "precludes any grant of non-dominant treatment."[61]

As noted by the Commission in the *Omaha Forbearance Order*, forbearance from dominant carrier regulation must be preceded by a finding that the ILEC seeking forbearance no longer has market power in the provision of the services for which it seeks forbearance.[62] Market share, supply and demand elasticities, and the firm's cost, structure, size and resources are all relevant to an analysis of whether the ILEC seeking freedom from dominant carrier regulation retains market power,[63] yet Verizon has not provided the type of information that would allow the Commission to conduct the required analysis for the Virginia Beach MSA.

In December 2007, the Commission denied Verizon's request for forbearance from dominant carrier regulation of its mass market switched access services in the Virginia Beach MSA because of Verizon's failure to present sufficient evidence of facilities-based competition.[64] There has been no seismic change in market conditions since the Commission denied Verizon's last claim for relief and Verizon relies on virtually the same evidence that the Commission found unpersuasive in the previous forbearance proceeding. In light of these facts,

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61 *COMPTEL, et al. Opposition,* at 32.

62 *Omaha Forbearance Order,* at ¶ 22.

63 *Id.*, at ¶ 31.

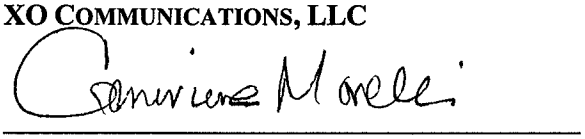
64 *6-MSA Order*, at ¶¶ 27, 33-34.

the Commission should find once again that continued application of dominant carrier and Computer III regulatory requirements to Verizon in the Virginia Beach MSA is necessary to ensure just and reasonable, and nondiscriminatory rates and terms for the mass market, enterprise market, broadband market, and wholesale market services Verizon provides. Consequently, Verizon's request for forbearance from dominant carrier and Computer III rules should be denied.

VII. CONCLUSION

For each of the forgoing reasons, and for the reasons set forth in the initial comments of the Joint Commenters, Verizon's petition should be dismissed. If the Commission declines to dismiss the petition, it must deny Verizon the regulatory relief it seeks on the ground that Verizon has not met the statutory prerequisites for forbearance contained in Section 10 of the Act.

Respectfully submitted,
NUVOX COMMUNICATIONS
XO COMMUNICATIONS, LLC

By: 

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